


Memorandum

Date: November 23, 2009

To: Quang Than
Remedial Project Manager
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Office of Military Facilities
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From: Regina Donohoe, Ph.D. 
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Subject: Applicable or Relevant and Appropriate Requirements for the Time-Critical Removal Action on Property Adjacent to Installation Restoration Program Site 1 at the Former Marine Corps Air Station (MCAS), El Toro, California (SITE: 400055)

On November 3, 2009, the Department of Fish and Game, Office of Spill Prevention and Response (DFG-OSPR) received your e-mail which forwarded the Department of the Navy (DoN) October, 19 2009 letter requesting potential State Applicable or Relevant and Appropriate Requirements (ARARs) that may apply in the preparation of the Time Critical Removal Action Memorandum for the property adjacent to Installation Restoration Program (IRP) Site 1, MCAS, El Toro. We appreciate the opportunity to provide State laws and regulations to guide remediation at this site. DFG-OSPR is providing the following analysis pursuant to Section 121(d)(2)(A) of the Comprehensive Environmental Response, Compensation, and Liability Act as well as under the National Contingency Plan, 40 Code of Federal Regulations sections 300.400(g) and 300.515(d) and (h).

IRP Site 1 covers approximately 73 acres and is located in the northeast portion of the former MCAS, El Toro, located in Orange County, California. The site, located within a tributary canyon of Borrego Canyon Wash, was utilized as an explosive ordnance disposal area from 1952 to 1999. A variety of military ordnance and explosives were detonated in trenches. The DoN has stated that the property immediately adjacent to the western border of Site 1, approximately 43 acres, was potentially impacted by Explosive Ordnance Disposal training activities at Site 1, as munitions and explosives of concern (MEC) and munitions debris (MD) have been identified in this area. The DoN is proposing to conduct a time-critical removal action to address potential explosive safety hazards presented by the MEC. DFG-OSPR previously provided ARARs for the Feasibility Study at Site 1 in a May 8, 2006 memorandum to Sue Hakim, Department of Toxic Substances Control. The current request is to identify ARARs for the time-critical removal action to be conducted at the property adjacent to

Site 1, utilizing alternatives that are similar to those proposed for MEC removal actions at Site 1. The current land use for the adjacent property is open space and a sedimentation basin.

According to EarthTech (2006), a reconnaissance-level habitat assessment was conducted at Site 1 in December 2000. Habitat at the site consists of non-native grassland, coastal sage scrub (9.7 acres), toyon-sumac chaparral (2.6 acres), and a bermed retention pond that provides seasonal wetland habitat (0.29 acres). A number of special status species have been observed at Site 1 including the Riverside fairy shrimp (federally endangered), Coastal California Gnatcatcher (federally threatened and California species of concern), Cactus Wren (California species of special concern), Southern California Rufous-crowned Sparrow (California species of special concern), and San Diego black-tailed jackrabbit (California species of special concern). No description of the habitat on the adjacent property has been provided but the DoN assumes it is similar to Site 1. The area around Site 1 is proposed to become the El Toro National Wildlife Area (See: <http://www.fws.gov/sandiegorefuges/EIToro/Planning%20Update%203%20Accessible%20Version.pdf>).

The Site 1 habitat assessment information in EarthTech (2006) was utilized to develop the attached site-specific list of Fish and Game Code Sections, which may apply as State ARARs with the date of enactment or promulgation. The specific citation and explanation for each listed ARAR is also included, in addition to applicable statutes and regulations. Since habitat assessment data for the property adjacent to Site 1 was not provided, additional biological surveys may be required to establish the applicability of the attached ARARs.

We would like to reiterate our interest in addressing any natural resource issues should there be a release(s) of any hazardous/deleterious materials at the MCAS, El Toro that could affect the State's natural resources. The staff at DFG-OSPR appreciates the opportunity to provide our ARARs. If you have any questions or need further information, please contact me at (831) 649-7150 or by e-mail at rdonohoe@ospr.dfg.ca.gov.

Reviewed by: Wendy Johnson, Staff Counsel
Carolyn Rech, Staff Environmental Scientist

Attachment

References:

Earth Tech. 2006. Final Phase II Remedial Investigation Report for Installation Restoration Program Site 1 – Explosive Ordnance Disposal Range, Former Marine Corps Air Station, El Toro, California

CALIFORNIA DEPARTMENT OF FISH AND GAME
LOCATION AND ACTION SPECIFIC ARARs FOR PROPERTY ADJACENT TO INSTALLATION RESTORATION
PROGRAM SITE 1 AT FORMER MARINE CORPS AIR STATION, EL TORO, CALIFORNIA

LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Aquatic habitat/species	Action must be taken if toxic materials are placed where they can enter waters of the State. There can be no release that would have a deleterious effect on species or habitat.	Fish and Game Code section 5650 (a), (b) & (f)	<p>This code section prohibits depositing or placing where it can pass into waters of the state any petroleum products (Section 5650(a)(1)), factory refuse (section 5650(a)(4)), sawdust, shavings, slabs or edgings (section 5650(a)(3)), and any substance deleterious to fish, plant life or bird life (section 5650(a)(6)). These are substantive, promulgated environmental protection requirements. These requirements impose strict criminal liability on violators. (<i>People v. Chevron Chemical Company</i> (1983) 143 Cal. App. 3d 50). This imposition of strict criminal liability imposes a standard that is more stringent than federal law.</p> <p>The extent to which each subdivision of section 5650 is relevant and appropriate depends on the site characterization. This ARAR would be considered potentially relevant if DoN anticipates that pollutants may migrate off-site to state waters in or via the Aqua Chinon Wash.</p>
Wildlife Species	Action must be taken to prohibit the taking of birds and mammals, including the taking by poison	Fish and Game Code section 3005 (Stats. 1957, c. 456, p. 1353 section 3005)	<p>This code section prohibits the taking of birds and mammals, including taking by poison. "Take" is defined by Fish and Game Code section 86 to include killing. "Poison" is not defined in the code. Although there is no state authority on this point, federal law recognizes that poison, such as Strychnine, may effect incidental taking. (<i>Defenders of Wildlife v. Administrator, Environmental Protection Agency</i> (1989) 882 F. 2d 1295). This code section imposes a substantive, promulgated environmental protection requirement.</p>

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LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Rare native plants	Action must be taken to conserve native plants, there can be no releases and/or actions that would have a deleterious effect on species or habitat.	Fish and Game Code section 1908 (Added by Stats. 1977, c. 1181, p. 3869, section 8)	<p>Section 1908 imposes a substantive requirement by forbidding any "person" to take rare or endangered native plants. California Code of Regulations Title 14 section 670.2 provides a listing of the plants of California that have been declared to be Endangered, Threatened or Rare. Fish and Game Code section 67 provides the definition of "person" as any natural person or any partnership, corporation, limited liability company, trust, or other type of association. Whether the federal government, or contractors acting on behalf of the federal government, would fall within that definition is a potential issue.</p> <p>Based on the reconnaissance survey in 2000 at Site 1 (Earth Tech, 2006), special status plant species were not observed. However, there is potential for special status plants to occur in the area. The survey of Site 1 was limited and the adjacent property has not been surveyed; therefore, special status plant species may be present in or near the site. To the extent that there are rare or endangered plants on site, section 1908 would be an ARAR.</p>

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LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Endangered Species	Action must be taken to conserve endangered species. There can be no releases and/or actions that would have a deleterious effect on species or habitat.	Fish and Game Code section 2080 (Added by Stats. 1984, c. 1240, section 2)	<p>This section prohibits the take, possession, purchase or sell within the state, any species (including rare native plant species), or any product thereof, that the commission determines to be an endangered or threatened species, or the attempt of any of these acts. This section is relevant and appropriate to the extent that there are endangered or threatened species in the area which have the potential of being affected if actions are not taken to avoid impacts.</p> <p>The reconnaissance survey in 2000 (Earth Tech, 2006) did not identify California endangered or threatened species at Site 1. However, the survey of Site 1 was limited and the adjacent property was not surveyed. To the extent that there are California endangered or threatened species at the site, as determined by protocol surveys, this section should be considered relevant and appropriate for consideration.</p>
Fully protected bird species/habitat	Action must be taken to prevent the taking of fully protected birds.	Fish and Game Code section 3511 (Added by Stats.1970, c. 1036, p. 1848 section 4)	<p>This section provides that it is unlawful to take or possess any of the following fully protected birds:</p> <ul style="list-style-type: none"> (a). American peregrine falcon (b). Brown Pelican (c). California black rail (d). California clapper rail (e). California condor (f). California least tern (g). Golden eagle

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LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
			<p>(h). Greater sandhill crane (i). Light-footed clapper rail (j). Southern bald eagle (k). Trumpeter swan (l). White-tailed kite (m). Yuma clapper rail</p> <p>The reconnaissance survey in 2000 (Earth Tech, 2006) did not identify fully protected birds at Site 1. However, the survey of Site 1 was limited and the adjacent property was not surveyed. Fully protected species such as the American Peregrine Falcon and White-tailed Kite have the potential to occur at MCAS El Toro. This section should be considered relevant and appropriate to the extent that such fully protected birds, or their habitat, are detected on or near the site.</p>
Birds	Action must be taken to avoid the take or destruction of the nest or eggs of any bird.	Fish and Game Code section 3503	<p>This section prohibits the take, possession, or needless destruction of the nest or eggs of any bird, except as otherwise provided by this code or any regulation made pursuant thereto.</p> <p>The reconnaissance survey in 2000 (Earth Tech, 2006) identified a number of birds species at Site 1. This section should be considered relevant and appropriate for consideration to the extent that nesting birds are present on site.</p>

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LOCATION	STANDARD	SPECIFIC CITATION	ARAR/TBC EXPLANATION
Birds of Prey	Action must be taken to prevent the take, possession, or destruction of any birds-of prey or their eggs.	Fish and Game Code section 3503.5 (Added by Stats. 1985, c. 1334, section 6)	<p>This section prohibits the take, possession, or destruction of any birds in the orders of Falconiformes or Strigiformes (birds-of-prey); or to take, possess, or destroy the nest or eggs of any such bird except as otherwise provided by this code or any regulation adopted pursuant thereto.</p> <p>This section will be relevant and appropriate if such species or their eggs are located on or near the site, and the federal Migratory Bird Treaty Act is not an ARAR. For example, the reconnaissance survey in 2000 (EarthTech 2006) documented the presence of Red-tailed Hawk, Red-Shouldered Hawk, Cooper's Hawk, and the American Kestrel at Site 1.</p>